

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

KIRBY SPENCER,

Plaintiff,

v.

AT&T DIGITAL LIFE, INC,

Defendant.

Case No. 2:14-cv-01136-APG-PAL

ORDER

(Mot Amd Sched Ord – Dkt. #53)

Before the court is Plaintiff's Motion for Entry of an Amended Scheduling Order and Incorporated Memorandum of Points and Authorities (Dkt. #53). The court has considered the motion, AT&T Digital Life, Inc.'s Opposition (Dkt. #56), and Plaintiff's Reply (Dkt. #59).

**BACKGROUND**

The Complaint (Dkt. #1) in this case was filed July 10, 2014. It asserts claims for alleged violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 et seq. The court entered a Discovery Plan and Scheduling Order (Dkt. #21) November 14, 2014, establishing an April 22, 2015 discovery cutoff, with dispositive motions due May 22, 2015.

Before the discovery cutoff ran, Plaintiff timely filed a motion to amend the complaint (Dkt. #26) to add class allegations on January 22, 2015. The district judge granted the motion for leave to amend the on September 1, 2015. *See* Order (Dkt. #48). The amended complaint was filed September 1, 2015, and on September 29, 2015, Defendant filed its Answer (Dkt. #52) to Plaintiff's first amended class action complaint. In a minute order entered September 3, 2015 the district judge also denied Defendant's motion for summary judgment without prejudice in light of the amended complaint to be filed, and denied Plaintiff's motion to stay and motion to file surreply as moot. *See* Minutes, (Dkt. #50).

1 Months after the district judge granted Plaintiff's motion for leave to assert a first  
2 amended class action complaint, Plaintiff filed this motion seeking "an amended scheduling  
3 order" to allow Plaintiff to conduct discovery on the newly added class claims, reset a date for  
4 dispositive motions, and deadline for filing a motion to certify a class. The motion also requests  
5 an "extension" of the deadlines to designate experts and rebuttal disclosures, a May 20, 2016  
6 discovery cutoff, and June 14, 2016 deadline to file a motion for class certification. Plaintiff  
7 proposes that a dispositive motion deadline be set 60 days after the court rules on a motion for  
8 class certification. Alternatively, if Plaintiff decides not to designate an expert, Plaintiff requests  
9 that an April 1, 2016 discovery cutoff be set with an April 29, 2016 deadline for a class  
10 certification motion.

11 At the time this motion was filed, Plaintiff understood that Defendant may be filing a  
12 second motion for summary judgment. Plaintiff argues that he is entitled to conduct discovery  
13 regarding the class allegations and asks that discovery be taken contemporaneously with briefing  
14 on any motion the Defendant files.

15 AT&T opposes the motion on various grounds. First, ATT&T argues the court  
16 previously advised counsel that any requests for an extension of the discovery plan and  
17 scheduling order deadlines would be scrutinized for a strong showing of good cause and due  
18 diligence, Plaintiff has shown neither. Second, when Plaintiff moved for leave to amend the  
19 complaint to add class allegations, he did not ask that the discovery deadlines be altered. In fact,  
20 the motion for leave to amend argued that Spencer sought to amend the complaint because of  
21 discovery already conducted he believed was relevant to class certification. At the time the  
22 motion to amend was granted, three months remained to complete discovery.

23 Third, AT&T opposes the motion to amend arguing Plaintiff cannot meet his burden of  
24 making a strong showing of good cause and excusable neglect for his failure to complete the  
25 additional discovery he now seeks or for his failure to move to reopen discovery. Spencer did  
26 not comply with LR 26-4. When he moved for leave to amend, he argued to the court that  
27 amendment would require only a few additional discovery requests concerning class certification  
28 and no additional expert discovery. Additionally, his motion does not explain why he waited

1 until November 24, 2015, to file the motion, months after the deadline for filing a motion for the  
2 extension of the discovery plan and scheduling order deadlines, and three months after the court  
3 granted him leave to amend.

4 Finally, AT&T asks that if the court is inclined to grant Plaintiff any relief to the  
5 discovery plan and scheduling order deadlines, that relief be limited to mitigate the resulting  
6 prejudice and costs to the Defendant. Because Plaintiff previously represented that any  
7 additional discovery needed by the amendment would be minimal and no expert discovery would  
8 be required, he should be held to his word. Plaintiff deposed AT&T's witnesses in Atlanta and  
9 Dallas, and no further depositions are necessary or warranted for class certification purposes.  
10 AT&T notes that the motion does not claim any depositions are required. Additionally, there is  
11 no reason to set a new deadline for dispositive motions because AT&T timely complied with the  
12 dispositive motion deadline and should not be forced to refile a motion for summary judgment  
13 for the third time.

14 Plaintiff replies that Defendant's opposition is both voluminous and creative, but does not  
15 dispute that the case was an individual action until leave to amend the complaint to add a class  
16 action was granted almost five months after discovery closed. Filing an amended complaint  
17 often means that new facts and legal claims are brought that require additional discovery to fully  
18 develop. It is well established that briefing on a dispositive motion should not prevent discovery  
19 from going forward. Plaintiff seeks an amended discovery plan and scheduling order and that  
20 discovery proceed while the motion for summary judgment is under submission to avoid  
21 litigating this case "piece by piece". There is good cause to enter a new discovery plan because  
22 Plaintiff could not undertake class discovery before the existing discovery cutoff. Plaintiff  
23 disputes that he was dilatory in moving for entry of an amended scheduling order. He filed this  
24 motion a little over two months after the amended complaint was filed on September 15, 2015.

25 Plaintiff disputes that he has had an opportunity to obtain class discovery. He points out  
26 that there is a significant difference between evidence that can, in good faith, support class  
27 allegations to file a class action complaint, and actual evidence obtained from Defendant  
28 sufficient to certify a class action. There are over 140,000 Digital Life Subscribers in the

1 putative class. Plaintiff served requests for production on Defendant seeking a list of all cellular  
2 telephone numbers registered and/or subscribed to the service that sends text messages at issue in  
3 this case. However, Defendant's responds by objecting on the grounds the requests sought  
4 information that was irrelevant and not reasonably calculated to lead to the discovery of  
5 admissible evidence because of the number of Digital Life Subscribers and because their cellular  
6 telephone numbers have no bearing on this case. Defendant also objected to responding to  
7 Request for Production Nos. 1 and 16 which sought documentation, technical manuals and  
8 marketing materials concerning the automated text message system and documentation  
9 describing the methods for reporting on outgoing text calls made, the content of those calls, and  
10 the call treatment performed when a called party responds to the text call.

11 Defendant also objected to Request for Production Nos. 14 and 24. In short, Plaintiff  
12 disputes that he obtained the discovery he needs to file a motion to certify a class. He seeks very  
13 limited additional discovery which the Defendant failed to produce before the discovery cutoff.  
14 Specifically, he seeks to discover customer service records limited to the Digital Life Subscribers  
15 who enrolled to receive text message notifications from the Defendant, and related information,  
16 and documents evidencing customers' complaints of misdirected or unauthorized text message  
17 notifications from the Defendant. Despite what the motion states Plaintiff does not want to take  
18 any additional depositions or designate an expert. The motion was in error in this regard.

19 Finally, Plaintiff opposes staying completion this limited additional discovery while the  
20 second motion for summary judgment is under submission arguing that a stay is at odds with the  
21 need for expeditious resolution of this case.

## 22 **DISCUSSION**

23 Rule 16(b) of the Federal Rules of Civil Procedure requires the court to enter a  
24 scheduling order that limits the time to: (1) join other parties and to amend the pleadings; (2) file  
25 and hear motions; and (3) complete discovery. The objectives of Rule 16(b) include: (i)  
26 expediting the disposition of the action; (ii) establishing early and continuing control so that the  
27 case will not be protracted because lack of management; (iii) discouraging wasteful pretrial  
28 activity; (iv) improving the quality of the trial through more thorough preparation; and (v)

1 facilitating the settlement of the case. Fed. R. Civ. P. 16(b). Because of heavy case loads, trial  
2 courts enter scheduling orders “to establish deadlines to foster the efficient treatment and  
3 resolution of cases.” *Wong v. Regents of the University of California*, 410 F.3d 1052, 1060 (9th  
4 Cir. 2005). A trial court’s case management efforts “will be successful only if the deadlines are  
5 taken seriously by the parties, and the best way to encourage that is to enforce the deadlines.” *Id.*  
6 at 1061. The district court has broad discretion in supervising the pretrial phase of litigation.  
7 *Miller v. Safeco Title Ins. Company*, 758 F.2d 364, 369 (9th Cir. 1985).

8 The Local Rules of Practice are numbered to correspond to their Federal Rule of Civil  
9 Procedure counterparts. *See* LR IA 1-1. They are to be construed so as to be consistent with the  
10 Federal Rules of Civil Procedure. *See* LR IA 2-1. The provisions of LR 26-1 set presumptively  
11 reasonable time limits for completing discovery, amending the pleadings and adding parties,  
12 disclosing experts and rebuttal experts, filing dispositive motions and submitting the joint pretrial  
13 order. One hundred eighty days is deemed presumptively reasonable to complete discovery  
14 unless the parties request special scheduling review and provide the court with a statement of the  
15 reasons why a longer or different time period should apply. *See* LR 26-1(d).

16 A court may modify a discovery plan and scheduling order before the expiration of the  
17 deadlines therein and before the final pretrial order is entered upon a showing of “good cause.”  
18 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). The good cause standard  
19 “primarily considers the diligence of the party seeking the amendment.” *Id.* The district court  
20 may modify a scheduling order if the deadlines “cannot reasonably be met despite the diligence  
21 of the party seeking the extension.” *Id.* “Moreover, carelessness is not compatible with a  
22 finding of diligence and offers no reason for a grant of relief.” *Id.* Finally, “[a]lthough the  
23 existence or degree of prejudice to the party opposing the modification might supply additional  
24 reasons to deny a motion, the focus of the inquiry is upon the moving party’s reason for seeking  
25 modification.” *Id.* If the party seeking the extension was not diligent, “the inquiry should end.”  
26 *Id.* Here, Spencer did not file a timely motion to extend the discovery cutoff 21 days before the  
27 expiration of the deadline. Rather, this motion was filed more than 8 months after the April 22,  
28

1 2015 discovery cutoff expired. It is therefore a motion to reopen discovery, not a motion to  
2 amend an existing plan.

3 Additionally, any motion or stipulation to extend a deadline or to reopen discovery must  
4 comply with Local Rules 26-4 and 6-1, and include the following:

- 5 (a) a statement specifying the discovery completed;
- 6 (b) a specific description of the discovery that remains to be completed;
- 7 (c) the reasons why the deadline was not satisfied or the remaining discovery was  
8 not completed within the time limits set by the discovery plan; and,
- 9 (d) a proposed schedule for completing all remaining discovery.

10 Failure to comply with scheduling order deadlines “may properly support severe  
11 sanctions and the exclusion of evidence.” *Id.* Rule 16(f) authorizes the trial court on motion, or  
12 *sua sponte*, to impose any of the sanctions authorized by Rule 37(b)(2)(A)(ii-vii) for a party’s  
13 failure to obey a scheduling order or other pretrial order. Courts establish discovery plans and  
14 scheduling orders “to deal with cases in a thorough and orderly manner, and they must be  
15 allowed to enforce them, unless there are good reasons not to.” *Id.* at 1062. The Ninth Circuit  
16 has recognized that disruption of the court’s discovery plan and scheduling order “is not  
17 harmless.” *Id.*

18 Orders modifying a discovery plan and scheduling order entered before the expiration of  
19 the deadlines and before the pretrial order may be modified upon a showing of “good cause.”  
20 Thus, while the court has discretion to modify the pretrial schedule “if it cannot reasonably be  
21 met despite the diligence of the parties seeking the extension,” Fed. R. Civ. P. 16 Advisory  
22 Committee Notes (1983 Amendment), “good cause” means scheduling deadlines cannot be met  
23 despite the parties’ diligence. “Moreover, carelessness is not compatible with the finding of  
24 diligence and offers no reason for a grant of relief.” *Johnson v. Mammoth Recreations, Inc.*, 975  
25 F.2d 604, 609 (9th Cir. 1992). “Although the existence or degree of prejudice to the party  
26 opposing the modification might supply additional reasons to deny a motion, the focus of the  
27 inquiry is upon the moving party’s reason for seeking modification.” *Id.* “If a party was not  
28 diligent, the inquiry should end.” *Id.*

1 Having reviewed and considered the matter, the court finds that the Plaintiff has not  
2 established good cause let alone excusable neglect to reopen the discovery plan and scheduling  
3 order deadlines.

4 This case involves claims that Spencer received unsolicited text messages generated by  
5 an AT&T Digital Life home security and monitoring system, although he was not a customer of  
6 this service in violation of the TCPA. AT&T claims that Spencer received these alerts because  
7 the cell phone number on his prepaid cell phone was previously assigned to a Digital Life  
8 customer. This customer had set up her account to receive these alerts, but later changed the  
9 phone number she gave AT&T and did not update her account with new contact information and  
10 text preferences. When this customer gave up her phone the number was reassigned to the  
11 prepaid cell phone Mr. Spencer purchased.

12 The court conducted an initial status and scheduling conference on November 18, 2014  
13 on the parties' stipulated discovery plan and scheduling order which requested special scheduling  
14 review and 60 days beyond the 180 days deemed presumptively reasonable by LR 26-1(e) to  
15 complete discovery. At the hearing, counsel for both sides indicated that only a modest amount  
16 of discovery was needed. The additional 60 days was requested because of the fast approaching  
17 holidays.

18 Plaintiff indicated he intended to serve a request for production of documents and take a  
19 Rule 30(b)(6) deposition of AT&T. Counsel for Plaintiff also indicated an expert would  
20 probably not be designated. Defense counsel indicated he intended to take the deposition of the  
21 non-party who had the cell phone number before the Plaintiff, Plaintiff's deposition, and  
22 Plaintiff's expert if one was designated. Under these circumstances, the court declined to give  
23 the parties an additional 60-day extension and entered a standard 180 day plan. The order was  
24 explicit that "any request for extension of these deadlines would be scrutinized for a strong  
25 showing of good cause and due diligence." A motion to extend the discovery cutoff was due no  
26 later than April 1, 2015. A party moving to extend the discovery cutoff was required to comply  
27 with the requirements of LR 26-4.  
28

1 Plaintiff did not move for an amended discovery plan and scheduling order until more  
2 than eight months after the discovery cutoff and more than two months after the amended  
3 complaint was filed. The motion provides no explanation at all for this delay. At the time  
4 Plaintiff filed the motion to amend, three months remained to complete discovery. Discovery  
5 closed and AT&T timely filed its second motion for summary judgment. The motion for  
6 summary judgment is now fully briefed and under submission to the district judge. The motion  
7 for summary judgment asserts that Plaintiff's claims fail as a matter of law because the text alerts  
8 he received at issue were not sent using an automatic telephone dialing system. It also argues  
9 AT&T did not make the calls at issue, and that the text alerts Plaintiff received fall within the  
10 TCPA's broad "emergency purposes" exception. Plaintiff's response to the motion for summary  
11 judgment argues that the text messages he received do not fall within the TCPA's emergency  
12 purposes exception, and that discovery establishes Defendant "made" the text message calls at  
13 issue. Plaintiff also argues that Defendant's system sent Plaintiff text message without any  
14 human intervention, and were therefore made by an automated dialing system. Alternatively, the  
15 response asks for Rule 56(d) relief to allow Plaintiff to conduct limited discovery regarding the  
16 potential functionalities of AT&T's system.

17 The motion for summary judgment is potentially dispositive of the entire case. If  
18 granted, no class discovery is needed.

19 However, as the district judge previously assigned to this case granted Plaintiff leave to  
20 amend to add class allegations. Plaintiff served certain discovery designed to obtain some of the  
21 discovery he seeks in this motion before the discovery cutoff expired and AT&T objected. The  
22 court will therefore give Plaintiff a brief opportunity to complete very limited class discovery if  
23 this case survives summary judgment. Specifically, provided the case survives summary  
24 judgment, the court will compel the Defendant to respond to Request for Production Nos. 1 and  
25 16 as modified by the court. The requests are overbroad on their face in requesting "any and all  
26 documentation." The court will modify Request for Production No. 1 to require production of  
27 "technical manuals and marketing materials sufficient to determine the functionality of the  
28 automated text message system at issue in this case." Request for Production No. 16 is modified



1 to require production of “sufficient documents to describe the methods for reporting an outgoing  
2 text message made, the content of those calls, and the call treatment performed when a party  
3 responds to the text call.”

4 The court will also permit Plaintiff to propound two additional requests for production of  
5 documents seeking customer service records limited to Digital Life subscribers who enrolled to  
6 receive text message notifications from Defendant during the relevant time period plead in the  
7 first amended complaint. The court will not require Defendants to disclose all cellular telephone  
8 numbers associated with the accounts, the names associated with the accounts, or the specific  
9 dates on which all text messages were sent to the cellular telephone number unless and until a  
10 motion to certify a class is granted. Finally, the court will permit Plaintiff to serve a request for  
11 production of documents evidencing Digital Life subscriber complaints that they received  
12 misdirected or unauthorized text message notifications from AT&T during the relevant time  
13 period plead in the first amended complaint. No further depositions or expert designation will be  
14 allowed.


15 **IT IS ORDERED** that:

- 16 1. Plaintiff’s Motion for Entry of an Amended Scheduling Order (Dkt. #53) is  
17 **GRANTED** to the limited extent he will be permitted to obtain the limited discovery  
18 described in the body of this order, if the motion for summary judgment is denied.
- 19 2. Plaintiff will have 14 days from an order denying summary judgment to serve  
20 Defendant with the 4 requests for production described in this order.
- 21 3. Defendant will have 30 days from service of the 4 requests for production to serve  
22 responses.
- 23 4. Plaintiff will have 90 days from entry of an order denying summary judgment to file a  
24 motion for class certification.
- 25 5. No additional depositions or expert designations will be allowed.
- 26 6. The deadline for filing dispositive motions has expired and will not be extended.

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1 7. Any request for relief not specifically addressed in this order is **DENIED**.

2 DATED this 9th day of February, 2016.

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5 PEGGY A. LEEN  
6 UNITED STATES MAGISTRATE JUDGE  
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